APPENDIX A.

Section 510, Mississippi Code, 1930.

"510. Actions for injuries producing death.--Whenever the death of any person shall be caused by any real wrongful or negligent act, or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured, or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased persons shall have left a widow or children, or both, or husband, or father, or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall, in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person, for the benefit of all persons entitled under the law to recover or by widow, for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. In such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to decedent and all damages of every kind to any and all parties interested in the suit.

"This section shall apply to all personal injuries of servants and employees received in the service of business of the master or employer, where such injuries result in death. Damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

"Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, or wife, or children, or father, or mother, or sister, or brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates.

"If the deceased be illegitimate and shall leave neither mother, child nor lawful heirs, then all the provisions of this section shall extend and apply to the legal representatives, and the other natural blood relatives of deceased the same as if they were his legitimate relatives and heirs, excepting his father and his father's relatives unless they be full brothers or sisters of deceased, or their heirs."

APPENDIX "B."

Decision of Mississippi Supreme Court

MISSISSIPPI POWER CO. v. ARCHIBALD
189 Miss. 332, 196 So. 760

McGEHEE, Justice.

The intestate, James V. Swearingen, received an electric shock while engaged in throwing a piece of baling wire over the 2,300 volt electric transmission lines of the distribution system belonging to the state of Mississippi, and constituting a part of the East Mississippi Insane Hospital property at Meridian in Lauderdale county, Mississippi, and from which shock and injury he later died.

It may be assumed for the purposes of this decision, and as the testimony tends to show, that the deceased had a fixed place of residence in Kemper county, Mississippi, at the time of his death, although employed as an attendant at the said Insane Hospital, where he then resided with his wife and children while so employed.

The appellant, a non-resident corporation, chartered and domiciled in the state of Maine, was sued as the sole defendant, and charged with negligence in transmitting electric current through the high powered lines over which the baling wire was thrown, where the wires, uninsulated, had been installed and located by the state several years prior thereto, in close proximity to a building on which the deceased was standing when he threw the baling wire which was to be tied to a radio aerial, so that the aerial might be pulled over the transmission line, and fastened to the upper story of the building.

James P. Archibald, administrator, appellee herein, is also a resident of the state of Maine. It appears that the widow of the said James V. Swearingen, deceased, waived

her right to be the administratrix of his estate, and permitted the said Archibald to be appointed as administrator. Letters of administration, or an ancillary administraton, was granted by the Chancery Court of Kemper county, Mississippi, on the 5th day of October, 1938, and on which date the said James P. Archibald, as such administrator, instituted this suit, returnable to the November term of the Circuit Court of said county. On the return day the appellant filed its petition and bond for the removal of the case to the district court of the United States for the eastern division of the southern district of Mississippi, sitting at Meridian; after notice of its intention to present the petition had been duly given. The petition alleged, among other things, that James C. Swearingen, deceased, left surviving him his widow, Mrs. Beatrice Swearingen, and his three minor children, Osborne, Lucile and Kennedy Swearingen, all of whom were at the commencement of this suit, and continuously thereafter have been and now are, resident citizens of the state of Mississippi, and the only real parties in interest in the suit under and by virtue of section 510 of the Code of 1930, which provided, in substance, that all damages of every kind suffered by the deceased, and which may also accrue by reason of his wrongful death, inure exclusively to his widow and children, free of the debts and claims against his estate. A demurrer was sustained to the petition and the removal of the cause denied. The action of the trial court in that behalf is here assigned as error.

A peremptory instruction was also requested, on the ground that the State, and not the appellant, installed the wires complained of, and determined their location as to safety; and on the further ground that the proximity of the wires to the building referred to was not the proximate cause of the accident. The instruction having been refused, the cause was submitted to the jury on the evidence, and a verdict rendered in favor of appellee for the sum of $10,000. However, it is unnecessary that we

consider any error alleged and assigned, other than the refusal to grant an order removing the cause to the United States District Court.

It may be conceded that the question of fraudulent joinder is not here involved in a legal sense, nor is any point made as to the motive of the real parties in interest in arranging to have a citizen of the state of Maine to qualify as administrator, and bring the suit against a resident defendant of that state to avoid a diversity of citizenship between the nominal plaintiff and the said sole defendant, although the purpose in taking such course is obvious.

The appellant, as we understand, concedes in its brief that the particular question of whether the residence of an administrator may ordinarily be determinative of diversity of citizenship is settled in the affirmative by the decisions of the Supreme Court of the United States, but we construe such admission to mean that such is true only where the estate being administered by him has some interest in the recovery sought, for we find section 510 of the Code of Mississippi of 1930, cited, emphasized and relied upon by it in support of the petition for removal, on the ground that under said statute the administrator is a mere nominal, rather than a real party in interest.

Section 510, supra, provides that damages for the wrongful injury and death of a married man shall be equally distributed to his wife and children, if he leaves such surviving him. The suit to recover such damages may be brought in the name of the personal representative for the benefit of the persons entitled under the law to recover, or by the widow for her own benefit, and on behalf of the children. The personal representative is not a necessary party where any of the persons entitled to recover under the law survive the deceased. He is not entitled, in behalf of the estate, to any part of the recovery, if any, that may be had. It is exempt

in favor of the widow and children from the payment of any debts owing by the estate. He cannot administer on it as an asset so as to be entitled to commissions thereon as part of his compensation as an administrator. In other words, it is their right of action, and the law permits them, in their discretion, to sue either in his name or in their own to recover the damages accruing to them, and to them alone. In the case at bar he is purely a formal party, with no more interest in the litigation, so far as the estate is concerned, than a next friend would have. No title to damages recoverable for the wrongful death of a person ever vests in an administrator under said section 510, supra, by virtue of his appointment, where the deceased leaves surviving him those entitled under the law to recover the damages sustained. Unless asked to lend his name as nominal plaintiff, the suit is of no concern to him. Moreover, if his name is used, the estate is neither benefited by a recovery nor adversely affected by a failure to sustain the cause of action sued on. The real actors in this suit, under the statute here under consideration, are the resident widow and children of James V. Swearingen, deceased, on one side, and the non-resident defendant on the other. In no just or reasonable view of the law governing the jurisdiction of the Federal Court in such cases can the personal representative be deemed the real party litigant in a suit brought under the statute here involved, where both the cause of action, and any recovery had thereon, is for the sole benefit of the widow and children. The statute specifically says that the recoverable damages "shall go to" the legal representative and be subject to debts only in the event there are none of the next of kin described in the statute entitled to recovery. Neither the damages to the decedent, nor to the widow and children in this case "go to" the personal representative of the estate in any event, and he is clearly not the person under the facts in this case "entitled under the law to recover."

[1-3] We are therefore of the opinion that the cause was removable to the District Court of the United States, as prayed for. McNutt v. Bland, 2 How. 9, 11 L.Ed. 159; New York Evening Post v. Chaloner, 2 Cir., 265 F. 204, 214; Irvine v. Lowry, 14 Pet. 293, 300, 10 L.Ed. 462. The rule that ordinarily the residence of the administrator controls on the issue of diversity of citizenship on removal is based upon the fact that he has the legal title by virtue of his appointment. Hess v. Reynolds, 113 U.S. 73, 5 S.Ct. 377, 28 L.Ed. 927; Amory v. Amory, 95 U.S. 186, 24 L.Ed. 428; Baltimore & O. R. R. Co. v. Koontz, 104 U.S. 5, 26 L.Ed. 643; Bonnafee v. Williams, 3 How. 574, 11 L.Ed. 732. Compare Webb v. So. Ry., 5 Cir., 248 F. 618, certiorari denied, 247 U.S. 518, 38 S.Ct. 582, 62 L.Ed. 1245, and compare Bogue v. Chicago, etc., D.C.,193 F. 728. But no title to the cause of action, or right to the damages sustained, accrues to him under section 510, Code of 1930, by virtue of his appointment. In bringing the suit he may be ignored entirely by those entitled to recover, for the reason that he has no beneficial interest in the claim or demand. On the other hand, those entitled to the recovery, if any, may in their discretion sue in his name as a nominal plaintiff, but they cannot, by electing to do so, deprive the Federal Court of the jurisdiction vested in it by virtue of the diversity of citizenship here existing between the real and only parties in interest.

Reversed and remanded.